

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

THE FIDELIO GROUP, INC.

For a construction permit
for a new FM station on
Channel 282B (104.3 MHz)
New York, New York

File No. BPH-910502MQ

To: Chief, Mass Media Bureau

**OPPOSITION TO REQUEST FOR RETURN OF
APPLICATION AS UNACCEPTABLE FOR FILING**

The Fidelio Group, Inc. ("Fidelio"), by its attorneys and pursuant to Sections 1.4(b) and 1.45(a) of the Commission's Rules, submits this Opposition to GAF Broadcasting Company, Inc.'s ("GAF") Request For Return of Application as Unacceptable for Filing, dated May 30, 1991 ("GAF Request").

GAF asserts that Fidelio's application for a construction permit for a new FM station on Channel 282B (104.3 MHz) New York, New York (the "Application") was untimely filed and therefore cannot be accepted by the Commission. As will be shown below, however, Fidelio's Application was filed before midnight on the next business day following the "official" filing deadline and therefore was timely filed under the Commission's policy affording an extra business day for time critical feeable filings.

Fidelio's Application is mutually exclusive with GAF's application for the renewal of license of FM station WNCN,

New York, New York. See FCC File No. BRH-910201WL. Section 73.3516(e) of the Commission's Rules sets the cut-off date for the filing of such mutually exclusive applications as the "end of the first day of the last full calendar month of the expiring license term." As WNCN's license term was set to expire on June 1, 1991 (see Section 73.1020(a)(17) of the Commission's Rules), the "official" cut-off date was May 1, 1991.

Significantly, however, the deadline for feeable

~~applications such as WNCN's~~ has been automatically extended

official deadline or cut-off date established by the Commission. 2/

Despite its clear applicability to Fidelio's Application, 3/ GAF's Request completely ignores the time critical filing policy, and instead relies solely on inapposite pre-Pittsburgh filing cases. GAF's feigned ignorance is particularly objectionable in light of its obvious awareness of the Commission's extra day rule. 4/

2/ Public Notice at 1. The MO&O similarly states that "[t]he delivery of the application to the lockbox bank on the next business day after the deadline date shall constitute a timely filing of the application in accordance with the deadline established by the Commission." MO&O, 5 FCC Rcd at 3565 (emphasis added). As an example of the effect of this policy, the Public Notice explained, "if the Commission establishes a deadline date of May 16, all filings received at the Mellon Bank in Pittsburgh, PA before 12 o'clock midnight on May 17, will be considered as timely filed."

3/ Time critical applications are defined as "those requests for FCC authorizations that must be filed by a specific deadline or be dismissed as untimely." MO&O, 5 FCC Rcd at 3564. In the case of an application, like Fidelio's, mutually exclusive with a pending renewal application, Section 73.3516(e) of the Commission's Rules establishes the cut-off date. See, e.g., Spanish International Communications Corporation, 2 FCC Rcd 3336, 3337 [¶ 4] and 3342 n.6 (1987) ("cut-off dates" for competing applications set by Section 73.3516(e) for timely filed renewal applications) (subsequent history omitted).

4/ Without citation, GAF discusses the Commission's "back-up" filing procedure for Pittsburgh filings. Because the "back-up" procedure was omitted in the same documents that detailed

5/ GAF suggests that an alleged initial typographical error on the FCC's "FAIR" report might indicate receipt of the application on May 3, 1990. See GAF Request at 2 n.1. Whether this error in fact occurred, GAF concedes that the application ~~was stamped by the Waller Desk as May 3. This stamp alone is~~

For the foregoing reasons, GAF's Request should be rejected and Fidelio's Application should be processed as timely filed.

Respectfully submitted,

THE FIDELIO GROUP, INC.

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June 13, 1991

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CERTIFICATE OF SERVICE

I, Jillian Wing, a Legal Secretary with the law firm of Hogan & Hartson, hereby certifies that on this 13th day of June, 1991, I caused to be placed in the United States mail, first class, postage prepaid, a copy of the foregoing **"Opposition to Request for Return of Application as Unacceptable for Filing"** addressed to the following:

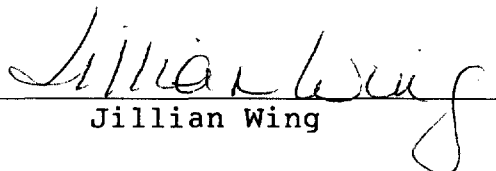
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*/ By Hand Delivery